

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ALBERTO ALATORRE,

Petitioner,

v.

WARDEN FIGAROA,  
Tallahatchie County Correctional  
Facility, Tutwiler, Mississippi,

Respondent.

CASE NO. 13cv1622-JLS (MDD)

REPORT AND  
RECOMMENDATION OF THE  
UNITED STATES MAGISTRATE  
JUDGE RE: RESPONDENT'S  
MOTION TO DISMISS  
PETITION FOR WRIT OF  
HABEAS CORPUS

Alberto Alatorre ("Petitioner") a state prisoner proceeding *pro se*, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1). Warden Figaroa ("Respondent"), filed a Motion to Dismiss the Petition as untimely under 28 U.S.C. § 2244(d)(1)(D). (ECF No. 15). For the reasons stated below, the Court RECOMMENDS Respondent's Motion to Dismiss be GRANTED.

**Summary of Proceedings**

Petitioner was convicted by a jury in San Diego County of five counts of robbery under Cal. Penal Code § 211 on June 9, 2010. The jury also found that Petitioner personally used a firearm in committing three of the robberies under Cal. Penal Code § 12022.53(b). Petitioner was sentenced and currently is serving a prison term of twenty years and four months for these offenses.

1       Petitioner appealed his conviction to the California Court of Appeal,  
2 Fourth Appellate district, Division One in case D057881. The court  
3 affirmed the convictions on December 19, 2011. (Lodg. 6). Petitioner  
4 subsequently appealed to the California Supreme Court and asserted the  
5 same claims presented to the California Court of Appeal. On March 14,  
6 2012, the state supreme court denied the appeal without citation. (Lodg.  
7 8). Petitioner's conviction became final on June 12, 2012, following the  
8 expiration of the ninety-day period to file a petition for writ of certiorari  
9 pursuant to 28 U.S.C. § 2244(d)(1)(A).

10       Petitioner did not file a petition for a writ of habeas corpus in the  
11 state court. On July 3, 2013, Petitioner filed the instant Petition for Writ  
12 of Habeas Corpus in this Court. (ECF No. 1). The Petition asserts the  
13 same claims that were considered and rejected on direct appeal.  
14 Respondent filed the instant Motion to Dismiss on November 20, 2013.  
15 (ECF No. 15). Petitioner requested and received two extensions of time  
16 to file an opposition to the motion to dismiss. (ECF Nos. 19, 23).  
17 Petitioner's third motion for extension of time, filed on May 19, 2014,  
18 included Petitioner's explanation regarding why his Petition was not filed  
19 timely. (ECF No. 26). Consequently, the Court denied the request for an  
20 extension and construed the motion as a response in opposition to  
21 Respondent's Motion to Dismiss. (ECF No. 27). Respondent filed a reply.  
22 (ECF No. 28). The sole issue before the Court, at this juncture, is  
23 whether the Petition must be dismissed as untimely.

#### 24                               **Standard of Review**

25       Inasmuch as the Petition was filed after the enactment of the Anti-  
26 terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub.L. No.  
27 104-132, 110 Stat. 1214 (1996), the provisions of AEDPA apply to this  
28 case. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

1 Under AEDPA, a state prisoner generally must file a federal  
2 petition for habeas corpus within one year of the underlying judgment  
3 becoming final. The relevant provisions are located at 28 U.S.C. §  
4 2244(d), which states as follows:

5 (1) A 1-year period of limitation shall apply to an application  
6 for a writ of habeas corpus by a person in custody pursuant to the  
7 judgment of a State court. The limitation period shall run from the  
latest of -

8 (A) the date on which the judgment became final  
by the conclusion of direct review or the expiration of the time  
9 for seeking such review;

10 (B) the date on which the impediment to filing an  
application created by State action in violation of the  
11 Constitution or laws of the United States is removed, if the  
applicant was prevented from filing by such State action;

12 (C) the date on which the constitutional right  
asserted was initially recognized by the Supreme Court, if the  
13 right has been newly recognized by the Supreme Court and  
made retroactively applicable to cases on collateral review; or

14 (D) the date on which the factual predicate of the  
15 claim or claims presented could have been discovered through  
the exercise of due diligence.

16 (2) The time during which a properly filed application for  
17 State post-conviction or collateral review with respect to the  
pertinent judgment or claim is pending shall not be counted toward  
18 any period of limitation under this subsection.

19 The record reflects that Petitioner did not seek review in the United  
20 States Supreme Court following the denial of his direct appeal by the  
21 California Supreme Court on March 14, 2012. Accordingly, for AEDPA  
22 purposes, the process of direct review of Petitioner's conviction concluded  
23 on June 12, 2012, when the ninety-day period for filing a petition for  
24 certiorari in the Supreme Court expired. *Bowen v. Roe*, 188 F.3d 1157,  
25 1158-59 (9th Cir. 1999). The limitations period for seeking federal  
26 habeas relief expired one year later, on June 12, 2013. *See* 28 U.S.C. §  
27 2244(d). Unless tolling applies, the instant Petition, filed on July 3,  
28 2013, is time barred.

## Discussion

Respondent's Motion to Dismiss asserts the Petition for Writ of Habeas Corpus is barred by the one-year statute of limitations provided at 28 U.S.C. § 2244(d)(1). (ECF No. 15). Respondent claims that the instant Petition is untimely because Petitioner did not properly file his petition until July 3, 2013, twenty-four days beyond the expiry of the limitations period. (*Id.*) Petitioner does not dispute that the statute of limitations period expired on June 12, 2013, but claims that he is entitled to relief due to extraordinary circumstances.

Respondent contends that Petitioner is not entitled to "statutory tolling" under AEDPA because there were no state court petitions pending and that Petitioner is not entitled to "equitable tolling" because Petitioner has failed to show that some extraordinary circumstance prevented him from filing timely. (*Id.*)

Petitioner has not suggested that he is entitled to statutory tolling. Petitioner asserts that he is entitled to equitable tolling due to extraordinary circumstances that were the "but-for and proximate cause of his untimeliness." (P. Opp. at 2).

### **1. Equitable Tolling**

"Federal courts recognize that the AEDPA statute of limitations may be equitably tolled in certain circumstances." *Holland v. Florida*, 560 U.S. 631, 643 (2010). The Ninth Circuit has held the AEDPA's one-year statute of limitations is subject to equitable tolling "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Stillman v. LaMarque*, 319 F.3d 1199, 1202 (9th Cir. 2003) (citing *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999)). The extraordinary circumstances must be the reason for the untimeliness. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003);

1 *Bryant v. Ariz. Atty Gen.*, 499 F.3d 1056, 1061 (9th Cir. 2007) (“A  
2 petitioner must show that his untimeliness was caused by an external  
3 impediment and not by his own lack of diligence.”) “[T]he threshold  
4 necessary to trigger equitable tolling [under AEDPA] is very high, lest  
5 the exceptions swallow the rule.” *Miranda v. Castro*, 292 F.3d 1063, 1066  
6 (9th Cir. 2002) (citing *United States v. Marcello*, 212 F.3d 1005, 1010 (7th  
7 Cir. 2000)). “[E]quitable tolling is unavailable in most cases.” *Miles*, 187  
8 F.3d at 1107.

9       Petitioner asserts that his petition was filed late because he was  
10 waiting for documents from the California State Bar regarding any  
11 disciplinary action taken against the prosecutor in his case. (ECF No. 26  
12 at 1). Petitioner argues that the documents from the state bar are the  
13 “key evidence” to prove his attorney misconduct claim and “without them  
14 it would be harder to prove.” (*Id.* at 2). Based on these facts, Petitioner  
15 contends the court should find equitable tolling applies in this case  
16 pursuant to *Holland v. Florida*, 560 U.S. 631 (2010).

17       Respondent argues that Petitioner’s claim of waiting for evidence  
18 from the state bar is insufficient for equitable tolling. (ECF No. 28 at 2).  
19 Specifically, Respondent asserts “[a]rguing that some new evidence  
20 might have a bearing on a claim raised in the federal Petition, which  
21 claim was raised on direct appeal and resolved against Petitioner based  
22 on the record, is insufficient to show that some extraordinary  
23 circumstance prevented Petitioner from (sic) filing a federal petition in a  
24 timely manner.” (*Id.* at 4). As noted by Respondent, the claims in the  
25 instant Petition are the same as those raised on direct review in the state  
26 court. (ECF No. 1). “On direct appeal in the California courts, Petitioner  
27 claimed the prosecutor committed prejudicial misconduct during closing  
28 argument. . . .” (ECF No. 28 at 2). According to Respondent, the evidence

1 Petitioner relies on here has no bearing on the claim of prosecutorial  
2 misconduct that can be readily disposed of from the record. (*Id.*).

3 *Holland v. Florida* does not support Petitioner's claim for relief.  
4 The Court in *Holland* held that "[a] petitioner is 'entitled to equitable  
5 tolling' only if he shows '(1) that he has been pursuing his rights  
6 diligently, and (2) that some extraordinary circumstance stood in his way'  
7 and prevented timely filing." *Id.* at 649 (citing *Pace v. Digulielmo*, 544  
8 U.S. 408, 418 (2005) (emphasis deleted)). "[C]ircumstances of a case must  
9 be 'extraordinary' before equitable tolling can be applied . . . ." *Id.* "The  
10 petitioner is not entitled to the benefit of every conceivable doubt; the  
11 court is obligated to draw only reasonable factual inferences in the  
12 petitioner's favor." *Porter v. Ollison*, 620 F.3d 952, 957 (9th Cir. 2010).

13 Petitioner carries the burden to affirmatively prove his entitlement  
14 to equitable tolling. The Court finds that Petitioner had sufficient facts  
15 to file a habeas petition before the expiration of the one-year statute of  
16 limitations. Petitioner's claim to equitable tolling appears limited to the  
17 delay in receiving documents from the state bar regarding unrelated  
18 misconduct allegations against the prosecutor in Petitioner's case. (ECF  
19 Nos. 18, 20, 22 and 26). This is not a "rare and exceptional" circumstance  
20 warranting equitable tolling. Petitioner could have prepared a basic  
21 habeas petition and filed it to satisfy the AEDPA deadline and then  
22 sought to amend his petition when he received more information. *See*  
23 *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1014 (9th Cir. 2009) ("If  
24 diligent, [Petitioner] could have prepared a basic form habeas petition  
25 and filed it to satisfy the AEDPA deadline . . . .")

26 Petitioner has not carried his burden of establishing that he is  
27 entitled to equitable tolling. His Petition is barred by AEDPA's statute of  
28 limitations. Accordingly, it is RECOMMENDED that Respondent's



1 Motion to Dismiss be GRANTED.

2 **2. Request for Evidentiary hearing**

3 “A habeas petitioner...should receive an evidentiary hearing when  
4 he makes ‘a good-faith allegation that would, if true, entitle him to  
5 equitable tolling.’” *Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2003)  
6 (internal citations omitted). Because Petitioner has failed to allege  
7 sufficient facts that would entitle him to equitable tolling, if found to be  
8 true, he has not shown that he is entitled to an evidentiary hearing. *See*  
9 *Roberts v. Marshall*, 627 F.3d 768 (9th Cir. 2010). (“District courts have  
10 limited resources (especially time), and to require them to conduct  
11 further evidentiary hearings when there is already sufficient evidence in  
12 the record to make the relevant determination is needlessly wasteful.”).

13 An evidentiary hearing is not required in this case. Accepting the  
14 facts alleged by Petitioner as true, the allegations do not entitle him to  
15 equitable tolling. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). “In  
16 short, ...[this case] does not present the extraordinary circumstance  
17 beyond the party's control where equity should step in to give the party  
18 the benefit of his [error]. . . .” *Harris v. Hutchinson*, 209 F.3d 325, 331  
19 (9th Cir. 2000).

20 **Conclusion**

21 IT IS HEREBY RECOMMENDED that the Court issue an Order:  
22 (1) Approving and adopting this Report and Recommendation; (2)  
23 Granting Respondent’s Motion to Dismiss as set forth herein; and (3)  
24 Directing that judgment be entered dismissing the Petition for failure to  
25 file within the one-year statute of limitations set forth in 28 U.S.C. §  
26 2244(d).

27 IT IS ORDERED that no later than **August 8, 2014**, any party to  
28 this action may file written objections with the Court and serve a copy on

1 all parties. The document should be captioned "Objections to Report and  
2 Recommendation."

3 IT IS FURTHER ORDERED that any reply to the objections shall  
4 be filed with the Court and served on all parties no later than **August**  
5 **18, 2014**. The parties are advised that failure to file objections within  
6 the specified time may waive the right to raise those objections on appeal  
7 of the Court's order.

8 IT IS SO ORDERED.

9 DATED: July 21, 2014

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12 Hon. Mitchell D. Dembin  
13 U.S. Magistrate Judge  
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